IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.116 OF 1990

Azaz Ahmad Shaikh ...Appellant

Vs.

The State of Maharashtra ...Respondent

Mrs Anita A. Agarwal for the Appellant.
Shri Rajesh More, A.P.P. for the Respondent.

CORAM : ABHAY S. OKA, J.

DATE : AUGUST 19/21 , 2006.

JUDGMENT:

1. Heard the learned counsel appearing for the Appellant and the learned A.P.P. for the State. By this Appeal, the Appellant has taken exception to Judgment and Order dated 30th November, 1989 passed by the learned Additional Sessions Judge, Pune. By the impugned Judgment and Order, the Appellant was convicted for the offence punishable under section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the said Act). The Appellant was sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.01,00,000/-. In default of payment of fine, the Appellant was directed to suffer further rigorous imprisonment for two years.

2. With a view to appreciate the submissions made by the counsel appearing for the parties, it will be necessary to briefly refer to the prosecution case. According to the case of the prosecution, Police Inspector Shri Borade attached to Faraskhana Police Station directed Police Sub-Inspector Shri Ganpat Pawar to make investigation into an offence of house breaking. The said Shri Ganpat Pawar at about 8.30 p.m. on 05th November, 1988 reached Moti Chowk which is situated in the locality of Budhwar Peth. He saw one person carrying two bags in his hand. He suspected that he may be able to recover the property involved in the offence of house breaking from the said person. Therefore, he asked the name of the said person who was allegedly the Appellant herein. The said police officer called two panchas. He searched one bag in the hand of the Appellant and found that there was a new pair of footwear in the said bag. He searched another bag of brown colour in the hand of the Appellant. He found one plastic packet in the said bag. The said plastic packet was containing three small plastic packets. He noticed that the first packet was containing charas, the second packet was containing opium and the third packet was containing brown sugar. In presence of the panch witnesses, a balance was brought and material was

weighed. According to the prosecution case the weight of the charas was 61.75 gm, weight of opium was 36.80 gm, and gard was 5.60 ml gm. Accordingly, the said material was seized and panchnama was made. The material was sealed. The learned Trial Judge accepted the prosecution case and has convicted the Appellant.

3. The learned counsel appearing for the Appellant submitted that in the present case, there is a complete non-compliance with mandatory requirement of section 50 of the said Act. She submitted that admittedly the Appellant was not made aware about his rights under sub-section 1 of section 50 of the said Act. She submitted that in view of the decision of the Apex Court in the case of **State of Punjab Vs. Baldev Singh (AIR 1999 Supreme Court Page 2378)** the conviction of the Appellant was vitiated. She submitted that even assuming that the alleged recovery was a chance recovery, the mandatory provisions of section 50 of the said Act will have to be complied with. She submitted that the Appellant has been falsely implicated in the case and therefore, the impugned order deserves to be quashed and set aside.

4. The learned A.P.P. submitted that it was a case of chance recovery and therefore, the mandate of

section 50 of the said Act will not apply. He submitted that the offence punishable under section 18 of the said Act has been established beyond reasonable doubt as the Appellant was found in possession of contraband articles. He submitted that no case for interference is made out.

5. I have carefully considered the submissions. The prosecution examined three witnesses. P.W.1 is Shri Ganpat Shankarrao Pawar who was Sub-Inspector of Police attached to Faraskhana Police Station at the relevant time. He stated that on 05th November, 1988 Inspector of Police Shri Borade directed him to carry out investigation in connection with an offence of house breaking. In connection with the said investigation, he was moving in the market area of Budhwar Peth, Pune alongwith his staff. At about 8.30 p.m. he came to Moti Chowk. At that time he noticed one person carrying two bags in his hands. He suspected that he may recover the property subject matter of offence of house breaking. He stated that the said person was apprehended by him who is the accused i.e. the Appellant in this Appeal. He called two panch witnesses who were passing by the road. Thereafter, search was taken of the bags in the hand of the a Appellant. One bag contained nothing

objectionable except a pair of footwear. The other bag contained a large plastic packet in which there were three small plastic packets. The three small plastic packets were containing charas, opium and brown sugar respectively. He stated that from a nearby by shop of a goldsmith, a balance was called for and material was weighed. He has stated the weight of the articles in his deposition. He stated that charas, opium and brown sugar were separately put in packets and sealed. He prepared a panchnama in presence of panch witnesses and the panchnama was signed by him as well as by the panch witnesses. He arrested the Appellant and prepared arrest panchnama. he was extensively cross-examined by the Advocate appearing for the Appellant. He stated that he was in uniform but his staff members were not in uniform. He denied the suggestion that the Appellant threw away the bags when he reached near the Appellant. He admitted that there were used clothes in the said bag alongwith packet containing drugs. He stated that during the personal search of the Appellant no amount was found with him.

6. P.W.2 Shivling Bhujaba Shelar was Police Head Constable who was attached at the relevant time to Faraskhana Police Station. He was at that time

working as a property clerk. He made entries of the sealed packets seized from the Appellant at the time of search. He took the sealed packets to the office of Chemical Analyser at Pune. There is no cross-examination made of the said witness by the Appellant-accused. The report of the Chemical Analyser which was exhibited on record completely supports the case of the prosecution.

7. P.W.3 Sunil Vithal Senoy is a panch witness. He completely supported the prosecution case by stating what transpired at the time of search of the accused. His evidence is consistent with the evidence of P.W.1 Shri Pawar. In the cross-examination he stated that a bag in which packets of the drugs were kept was of chocolate colour. P.W.1 Shri Pawar has stated that the said bag was of brown colour. Only because of this minor and insignificant discrepancy, it cannot be said that the versions of the said two witnesses are inconsistent. He admitted that the other panch witness was known to him. However, he denied that the panchnama was not prepared in his presence. The evidence of P.W.1 Shri Pawar and P.W.3 Shri Sunil Senoy is not at all shaken in the cross-examination. The panchnama as well as the arrest panchnama have been duly proved in evidence.

8. The question which is required to be considered is whether it was necessary to comply with requirement of section 50 of the said Act. In this connection the decision of the Apex Court in the case of **Sorabkhan Gandhkhan Pathan Vs. State of Gujarat ((2004) 13 Supreme Court Cases Page 608)** is relevant. In paragraph No.6 of the said decision the Apex Court has held thus:

> "6. The court below have found no merit in this case and we agree with the same because the information received by the police officer was not in regard to any contraband article as contemplated under the Act. The information was in regard to certain illicit liquor, therefore, the search by the officer concerned was not under the provisions of the Act. **It is only by accident that in the course of search for illicit liquor the officer concerned found 1960 grams of charas, therefore, this could be treated as a chance recovery for which it is not necessary to follow the procedure contemplated under Section 42/50 of the Act.**"(Emphasis supplied)

Even in the decision of the Apex Court in the case of State of Punjab Vs. Baldev Singh (Supra) which was relied upon before me, the Apex Court held that compliance with requirement of section 50 is necessary when an empowered officer or duly authorised officer acting on prior information is about to search a person. Another decision of the Apex Court is relevant on this aspect. That is the case of State of H.P. Vs. Pavan Kumar (2005) 4 Supreme Court Cases Page 530. The said decision is by Bench of three Hon'ble Judges of the Apex Court. The question which was referred to the larger Bench for decision was whether the safeguards provided by section 50 of the said Act regarding search of any "person" would also apply to any bag, briefcase or any such article or container etc. which is being carried by him. The Apex Court considered the entire law on the subject. The Apex Court relied upon the earlier decision of the constitution bench in the case of State of Punjab Vs. Baldev Singh (Supra). The Apex Court held that there is no warrant or justification for giving an extended meaning to word "person" occurring in the said provisions so as to include any bag, article or container or some other baggage carried by him.

9. Coming back to the facts of the case, it is obvious from the evidence of P.W.1 Shri Pawar that he did not take search of the Appellant on the basis of any information received by him. He apprehended the Appellant while carrying on investigation of an offence relating to house breaking on suspicion that the articles involved in the said offence may be in possession of the Appellant. No suggestion has been given to the P.W.1 Shri Pawar in his cross-examination that while taking search of the Appellant he acted on the basis of information, suspicion or belief that the Appellant was carrying any offending substances with him. Thus, what has been established on evidence is only by a chance or an accident the articles were found at the time of search. Thus, in view of law laid down by the Apex Court the mandatory requirement of compliance with section 50 of the said Act will not be attracted. Even the requirement of informing the Appellant about his rights under sub-section 1 of section 50 of the said Act will not be attracted.

10. Apart from the aforesaid aspects, it is obvious that the drugs were found in a bag which the Appellant was carrying in his hand and it is not at all the case of the prosecution that drugs were found on the person of the Appellant. As held by the Apex

Court in the case of State of H.P. Vs. Pavan Kumar (supra), the bag which was carried by the Appellant cannot be treated as a part of his person. That is the second reason why compliance with section 50 of the said Act was not expected.

11. The panchnama and the evidence of panch witnesses has clearly established the possession of the drugs by the Appellant. Therefore, the Trial Court was justified in applying presumption under section 54 of the said Act. There is nothing on record to rebut the said presumption.

12. Considering these aspects of the case, it is difficult to find fault with the impugned Judgment and Order.

13. The learned counsel appearing for the Appellant submitted that the charge itself mentions that the Appellant was found in possession of opium weighing 36.80 gm. alongwith the container and he was found in possession of charas-cannabis weighing about 61.75 gm alongwith container. She submitted that there is no evidence on record to show as to what was the weight of the container and therefore, it cannot be said that the Appellant was found in possession of

commercial quantity. She invited my attention to the panchnama at Exhibit 6 and submitted that section 18 of the said Act cannot be applied.

14. Perusal of the report dated 30th November, 1988 submitted by the Assistant Analyser in the office of Assistant Director of Forensic Science Laboratory shows that weight of opium containing 10.9% morphine was 35 gms. Infact, the panchnama at Exhibit 6 specifically records that weight of charas was 61.75 gm. inclusive of weight of the plastic bag. However, the weight of opium of 36.80 gms is mentioned in the panchnama exclusive of the the plastic bags. At the relevant time the small quantity of charas was notified as 5 gms. and that of opium was 5 gms. Hence, no fault can be found with the learned Trial Judge when he applied section 18 of the said Act.

15. There is no merit in the Appeal and the same is dismissed.

JUDGE